UPREME COURT, U.S.

FILED

AUG 1 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1972

No. 72-552

ROBERT SATIACUM,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

BRIEF FOR RESPONDENT IN REPLY TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

JOSEPH D. MLADINOV,
Special Counsel to the
Prosecuting Attorney of
Pierce County, Washington,
Counsel of Record for the
State of Washington, Respondent.

946 County-City Building
Tacoma, Washington 98402

Area Code: 206
593-4231

Date: July 31, 1973.

PRESTIGE PRESS TACOMA, WASHINGTON

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This brief is submitted in response to the request of this honorable court[1] for the reply of the State of Washington to the memorandum for the United States as amicus curiae.

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1 The request of this honorable court was communicated to counsel by a letter of the Clerk dated June 11, 1973.

I

The memorandum notes that:

(a) "Petitioner, while in a boat well into Commencement Bay, and thus neither in the Puyallup River nor within the limits of the Puyallup Reservation (Tr. 9, 78, 81, 122, 126)" . . .

(Memorandum, pp. 2-3)

(b) "was arrested by Washington State authorities and charged with (1) possessing salmon taken from a salmon preserve for commercial purposes, (2) unlawful waste or destruction of food fish." . . .

(Memorandum, p. 3)

(c) The trial court

. . . "dismissed the charge of possessing salmon taken from a salmon preserve on the premise that petitioner is a treaty protected Indian who was fishing off reservation at usual fishing places (see Tr. 137-140) and on the ground that 'nobody could know whether the regulation was reasonable or necessary' and that 'A regulation is necessary but not total prohibition' (Tr. 139-140)." [2]

(d) "The trial court 'refused to dismiss the charge of wasting fish on the ground that Indians have no right to waste fish (Tr.

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[2] No appeal was taken from the dismissal of this charge, although the rules promulgated by the Supreme Court of Washington provide for an appeal by the state in a criminal case to an intermediate Court of Appeals. See: CAROA, Rule 14 (8), 76 Wn.2d cvi-cvii, as follows:

"In criminal cases the state may appeal, upon giving the same notice as is required of other parties, when the error complained of is based on the following: (1) The setting aside of an indictment or information; (2) The sustaining of a demurrer to an indictment or information; (3) An order arresting judgment on any grounds; (4) An order granting to anyone, convicted by a jury, a new trial on any grounds; (5) Any order which in effect abates or determines the action, or discontinues the same, otherwise than by a verdict or judgment of not guilty."

141) . . . The jury returned a verdict of guilty of destroying food fish (Tr. 162) and the court fined petitioner $75."

(Memorandum, pp. 3-4)

(e) "On appeal, the Supreme Court of Washington affirmed the conviction."

(Memorandum, p. 4)[3]

The state would note that the headnote prepared by the official reporter of the Supreme Court of Washington would appear to recognize this as a ruling which was a basis for the Supreme Court's judgment. The headnote, keyed to this ruling, states:

> [3] **"Fish—Indians—Treaties—Right to Fish in Common With Others—Unlawful Waste of Fish.** The right guaranteed by treaty to an Indian to fish 'in common with all citizens of the Territory' does not provide a basis for excusing his violation of a statute prohibiting unlawful waste or destruction of food fish."
>
> (80 Wn.2d at 492)

The Administrative Rules of the Supreme Court of Washington (abbreviated SAR) provide that the Supreme Court shall appoint a "reporter for the decisions of the court" (76 Wn.2d at xxii, Rule 17(1)), and further provide:

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[3] The Supreme Court of Washington ruled:

"[3] We note in passing that if appellant's contention is that he did not commit a crime because he was merely exercising the fishing rights guaranteed to him by the Medicine Creek Treaty, any such contention is without merit in this case. The right to fish 'in common with all citizens of the Territory' guaranteed by that treaty does not include the right wantonly to waste food fish. There can be no doubt that prohibition of the wasting of food fish is a conservation measure which is 'reasonable and necessary to preserve the fishery,' and is well within the police power of the State of Washington. *Department of Game v. Puyallup Tribe, Inc., Supra* at 261."

(80 Wn.2d 492, at 495, 495 P.2d 1035, at 1036).

"(4) He shall prepare the decisions for publication in the weekly advance sheets by giving the title of each case, the classification of the points decided, and the names of counsel, and shall prepare a subject index to each book and prefix a table of cases reported. When the decisions published in a volume of advance sheets approximately equal those to be published in the corresponding permanent volume, the volume of advance sheets shall be closed, and the reporter shall prepare a cumulative subject index covering such volume, to be published in the last book thereof.

"(5) He shall prepare the decisions for publication in the permanent volumes by giving the title of each case, a syllabus of the points decided, and the names of counsel, and shall prepare a full and comprehensive index of each volume, and prefix a table of cases reported.

(6) He shall furnish to each of the justices proof sheets of the decisions written by such justice, as the same are to appear in the bound volume, and, after examination, the justice will return them to the reporter."

(76 Wn.2d at xxiii)

The special status of the official headnotes in the Reports of the Supreme Court of Washington has already been delineated by the Reporter of Decisions who has been the reporter continuously since 1961 beginning at 57 Wn.2d, and is at present, 83 Wn.2d. See: Richard F. Jones, *The Role of Official Headnotes in Legal Research*, 59 Law Library Journal 277-283 (1966).

(f) . . . "We agree that while fishing off-reservation a Puyallup Indian has a right to fish in usual and accustomed places but that right does not include a right wantonly to destroy food fish. And there is no doubt that petitioner is subject to state court jurisdic-

> tion with respect to such an off-reservation offense."
>
> (Memorandum, p. 4)
>
> ". . . In our view petitioner was, on this record, properly convicted of unlawful waste or destruction of food fish outside the Reservation."
>
> (Memorandum, p. 7)

In this setting, then, the state would respectfully suggest that there is, by the ruling of the Supreme Court of Washington on this point, an adequate, independent, nonfederal ground for the judgment of the Supreme Court of Washington; and this honorable court has consistently not accepted review of such a judgment, even when a federal question also might be involved, and, indeed, even possibly not have been properly decided by a state supreme court. See *Cramp v. Board of Public Instruction*, 368 U.S. 278, at 281, 82 S.Ct. 275, 7 L.Ed.2d 285, at 288 (Dec. 11, 1961); *Murdock v. Mayor etc. of Memphis*, 20 Wall. 590, at 636, 22 L.Ed. 429, at 443-444 (January 11, 1875).

II

The memorandum notes that:

(a) . . . "And the United States and the State of Washington continue to recognize a distinct Puyallup Indian community, as the Washington Supreme Court itself explicitly found in *Department of Game v. Puyallup Tribe*, 70 Wash. 2d 245, 252, 422 P. 2d 754, 758:

> 'We are satisfied that so long as the United States government, through its appropriate agencies, continues to recognize the existence of the Puyallup Tribe of Indians and its tribal roll, as they clearly do, the Superior Court for Pierce County acted without jurisdiction in making a judicial determination of the tribe's termination.
>
> 'Historically and uniformally the termination of federal supervision of an Indian tribe has been accomplished by the Congress through enactment of legislation. * * * '

The above language was specifically reaffirmed by the Washington Supreme Court in *Department of Game v. Puyallup Tribe, Inc.*, 80 Wash.2d 561, 497 P.2d 171, 174, decided subsequent to the instant case."[4]

(Memorandum, p. 6)

(b) . . . "The existence of the Reservation, a federal question, was not at issue in the trial court and consequently there was neither an

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[4] As noted in the memorandum, p. 7, this honorable court granted the petition for writ of certiorari on March 19, 1973. US , S.Ct. , 36 L.Ed. 2d 177.

evidentiary nor legal development of the matters relevant to such a question.[3]"

"[3] The Washington Supreme Court had previously expressed the view that the Reservation no longer exists. *Department of Game v. Puyallup Tribe*, 70 Wash. 2d 245, 253, 261, 422 P.2d 754 (Sup. Ct.) On review of that decision, however, this Court specifically found it unnecessary to reach that question. *Puyallup Tribe, supra*, 391 U.S. at 394, n. 1."

(Memorandum, pp. 4-5)

(c) "We agree with the State of Washington that the present case is not a proper one for determining the continued existence of the Puyallup Reservation or residual on-reservation fishing rights of the Puyallup Tribe, because of the inadequacy of the record below."

(Memorandum, pp. 6-7)

(d) In order to determine the issue of the existence of the reservation,

. . . "on the basis of a proper factual record, the United States has brought a suit in the United States District Court for the Western District of Washington, to enjoin the enforcement of state fishing laws within the Reservation. On January 29, 1973, that court decided the case adversely to the United States on the ground that the Reservation no longer exists. *United States v. The State of Washington*, No. 39-71C3. An appeal from that decision by the United States is now pending in the court of appeals."

(Memorandum, p. 7)

The memorandum decision of the United States District Court, dated January 29, 1973, and the Court's order, dated January 31, 1973, are reproduced in the appendix hereto, as Appendix A and Appendix B, respectively.

The appeal is No. 73-1793 in the United States Court of Appeals for the Ninth Circuit.

In this setting, then, the state respectfully suggests, it would be appropriate for this honorable court to deny the petition for a writ of certiorari.

This would appear to be particularly so where, as here, there is an adequate and independent nonfederal basis for the judgment of the Supreme Court of Washington; where the federal ground "was not at issue in the trial court so that there was neither an evidentiary nor legal development" (memorandum, p. 4) which is so desirable for appellate review; and the trial record made is inadequate, factually and legally; and where the federal ground reflects more the statements in the opinion, rather than in the judgment:[5] where there would appear to be another vehicle on the path to ripeness for the eventual resolution of the federal ground.

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[5] This honorable court has noted:

. . . "This court, however, reviews judgments, not statements in opinions."

See: *Black v. Cutter Laboratories*, 351 US 292, at 297, 76 S.Ct. 824, 100 L.Ed. 1188, at 1196 (June 4, 1956), rehearing denied, 352 U.S. 859, 77 S.Ct. 21, 1 L.Ed.2d 69 (Oct. 8, 1956).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certorari in this matter should be denied.

Respectfully submitted,

JOSEPH D. MLADINOV,

Special Counsel to the
Prosecuting Attorney of
Pierce County, Washington,

Counsel of Record for the
State of Washington, Respondent.

946 County-City Building
Tacoma, Washington 98402
Area Code: 206
593-4231

Date: July 31, 1973.

APPENDIX A

(Memorandum Decision, United States District Court, Western District of Washington, dated January 29, 1973, in No. 39-71C3).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. 39-71C3

MEMORANDUM DECISION

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

THE STATE OF WASHINGTON, *Defendant*.

The United States Government seeks to enjoin the State of Washington from the enforcement of certain laws bearing on the methods by which the steelhead trout or fish may be captured on the Puyallup River in Pierce County.

In turn, the State of Washington moves this Court for an order declaring that it possesses the power to regulate the taking of steelhead fish by Indian members and descendants of the Reorganized Puyallup Tribe from the Puyallup River.

This controversy has been before the Supreme Court of the United States and numerous intermediate courts on prior occasions. In describing this controversy, Justice William O. Douglas as the Supreme Court of the United States said in the case of *Puyallup Tribe v. Department of Game of the State of Washington* and the *Nisqually Tribe v. Department of Game of the State of Washington*, 391 U.S. 392:

> "These cases present a question of public importance which involves in the first place a construction of the Treaty of Medicine Creek made with the Puyallup and Nisqually Indians in 1854 (10 Stat. 1132) and secondly the constitutionality

of certain conservation measures adopted by the State of Washington allegedly impinging on those treaty rights."

It is interesting to note that both the United States Government and the State of Washington have asked the Supreme Court of the United States to again consider the questions that were presented to that Court. In other words, both have petitioned certiorari. Whether or not the Supreme Court of the United States will reconsider its opinion is only conjecture.

There is no doubt of the constitutionality of the laws of the State of Washington enacted by the State Legislature empowering the Department of Game to regulate the taking of steelhead fish by both non-Indians and Indians off reservations. The Court has unequivocally passed on that question. At page 398, Justice Douglas said:

> "The treaty right is in terms the right to fish 'at all usual and accustomed places.' We assume that fishing by nets was customary at the time of the Treaty; and we also assume that there were commercial aspects to that fishing as there are at present. But the *manner* in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the "usual and accustomed places, *in the 'usual and accustomed'* manner. But the Treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one 'in common with all citizens of the Territory.' Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. The right to fish 'at all usual and accustomed' places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the

United States. Act of June 2, 1924, 43 Stat. 253, as superseded by § 201(b) of the Nationality Act of 1940, 8 U.S.C. § 1401 (a) (2). But the manner of fishing, the size of the take, the restriction of 'commercial' fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."

But the United States Government contends that in the instant case the reservation boundaries that existed in the year 1872 encompassing approximately 18,000 acres of land and some seven miles of the Puyallup River from a point a short distance from the mouth of said river and extending some seven miles upstream entitles the Indians to fish without restriction by the State because the part of the river described is within the present boundaries of the Puyallup Indian Reservation and upon which the Indians have unrestricted right to fish.

The Government contends that the Supreme Court of the United States did not determine the present claim of the United States that fishing within the 1873 boundaries is reservation fishing, vis-a-vis, non-reservation fishing because the issue was never presented to the Court.

At the request of this Court, the brief of the Puyallup Tribe prepared by the attorney for the Tribe was obtained so that this Court could determine the question of whether or not the issue had been presented to the Supreme Court. A reference to the brief shows that it was, and at page 43 of said brief and the first paragraph thereof contains the following language:

"The Indian petitioners submit that unless and until the Congress enacts a Termination Act terminating federal supervision over the Puyallup Indian reservation or constricting the boundaries of the original Puyallup Indian reservation, the original boundaries mark the area within which the fishing rights reserved to them by the Treaty

of Medicine Creek may be exercised without restriction by state laws or regulations."

It is true that in the footnote to the opinion of the Supreme Court of the United States previously referred to Justice Douglas says that the Court does not reach the issue of the present boundaries of the Puyallup Reservation, but for whatever reason the Court made that decision, the fact remains that the issue was presented.

This Court is not required to determine the conservation issue at this time. That is posed in other cases concerning the "prohibition of the use of set nets" in these fresh waters as a "reasonable and necessary conservation measure." Eventually this Court may be required, as directed by the Supreme Court of the United States, to make ultimate findings on the conservation issue and also cover the issue of equal protection implicit in the phrase "in common with."

The State of Washington and its Department of Game, pursuant to the statutory regulation regarding the taking of the said steelhead fish, may preclude the taking of said fish by any other means than the hook and line in the interest of conserving the resource.

Therefore, the motion of the United States Government to enjoin the State of Washington and its Department of Game from interfering with the taking of said steelhead fish from the Puyallup River by Indians enrolled in the Reorganized Puyallup Tribe is denied, and the motion of the State of Washington declaring said State to possess the power to regulate the taking of steelhead fish on the Puyallup River by Indian descendants of enrolled members of the Reorganized Puyallup Tribe or members of said Reorganized Puyallup Tribe is granted, and that said State, pursuant to its laws and the rules and regulations by its Department of Game shall have said power provided that said rules and regulations for the taking of said steelhead fish apply equally to all persons, Indians and non-Indians alike.

Further, the said order applies to all areas of the Puyallup River including the navigable portion thereof which is stipulated to by the parties as extending to and beyond the upstream area where the United States Government contends that the Puyallup Indian Reservation boundaries of 1873 continue to exist, and the Court finds as a fact that said reservation boundary does not continue to exist as contended by the United States.

IT IS SO ORDERED.

DONE BY THE COURT this 29th day of January, 1973.

WILLIAM N. GOODWIN
United States District Judge

APPENDIX B

(Order, United States District Court, Western District of Washington, dated January 29, 1973, in No. 39-71C3).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. 39-71C3

ORDER

UNITED STATES OF AMERICA, *Plaintiff.*

vs.

THE STATE OF WASHINGTON, *Defendant.*

The Court, in its Memorandum Decision, has rejected the contention of the United States that the 1873 boundaries of the then existing Puyallup Indian Reservation still exist.

It has been twice held to the contrary. *United States v. Kopp,* 110 Fed. 160 (1901). Subsequent to that decision, the Supreme Court of Washington has reached the same conclusion in *Goudy v. Meath,* 38 Wn. 126, 80 Pac. 295; *State v. Smokalem,* 37 Wn. 91, 79 Pac. 603.

The Puyallup Allotment Act, 27 Stat. 63; the appointment of a commissioner to superintend sale of allotments, 30 Stat. 87, the consent of the United States to the removal of restrictions upon alienation by Puyallup Indians of their allotted lands, 33 Stat. 565; the legislative intent expressed in the House Committee Report No. 301, 58th Congress, Second Session (1904), in combination resulted in the almost total divestiture of the land within the 1873 reservation boundaries by the Indians. The Indian cemetery property was transferred by the Indian descendants of the members of the former Puyallup Tribe to certain individual trustees. The United States no longer supervised or claimed any right to supervise the ac-

tivities of the said trustees in the performance of their duties as trustees of the said Cemetery Trust. Ex. JX 19, recorded March 25, 1908, dated in 1906.

The Indian Agency property, which no longer was the site of the Indian Agency and the home of the supervisor, was to be sold and the proceeds distributed to the tribal descendants. In 1948 the channel of the Puyallup River was altered by the United States Corps of Engineers to prevent the annual devastating floods that inundate the lands in the Puyallup River Valley. This was a part of what is known as the Mud Mountain Dam project, and the Mud Mountain Dam was constructed to regulate the flow of the Puyallup River during the periods of heavy runoff caused by melting snow in the Cascade Mountains where the river and its tributaries have their source.

The bed of the river as it existed in 1873 and the river channel within the 1873 boundaries of the reservation have been materially changed by this flood control project.

The unrestricted sale of the allotted lands has resulted in the population growth and establishment of incorporated and unincorporated towns, industrial complexes, a municipal corporation titled The Tacoma Port Authority, and many other commercial and residential areas on the land now claimed to be within the boundary of the Puyallup Indian Reservation. An examination of the relief map exhibited by the Government shows the extent of the development of the areas.

Of the 18,000 acres more or less lying within the Government's proposed reservation boundary, only approximately 30 acres are presently claimed to be land held by the United States in trust for the reorganized tribe.

The evidence supports the conclusion that the Puyallup Indian Reservation neither legally, actually, nor practically exists, nor is there any valid reason for its existence.

It is claimed by the United States that the members of the Reorganized Tribe have some claim to the

present bed of the Puyallup River, and that water flowing over the river bed flows over reservation land, and that fish swimming in the water flowing over the reservation land may be captured by the Indians without regard to state conservation laws.

It is agreed that the Puyallup River is a navigable stream and title to the land normally is in the United States, but assuming without deciding that by establishment of the reservation and subsequent alienation of the lands bordering the river are without reference to the bed of the river, and in the instrument the Indian allottee-grantor retains some interest in the riverbed, does it follow that the combined interest of all the riparian Indian allottees who alienated their allotments but did not transfer their riparian interests revitalizes the deceased reservation so that the bed of the river is now reservation land held in trust by the United States for the benefit of the descendants of the members of the original Puyallup Tribe or the members and descendants of the members of the Reorganized Puyallup Tribe? The common sense conclusion dictates that wherever title to the land may lay, the bed of the river is not an Indian reservation, and that the State of Washington owns the fish that swim in this navigable stream and may control by its conservation laws the manner in which said fish may be taken. Assuming without deciding that the members of the Reorganized Tribe have some claim to the present bottom of the Puyallup River, it does not follow that the riverbed is the Indian Reservation. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), decided title to a riverbed but did not reestablish or revive an Indian reservation that had been extinguished by legislation. Act of 1906, 44 Stat. 148.

The Puyallup tribal right to unrestricted fishing on the waters of the Puyallup River that flowed through the 1873 reservation boundaries was extinguished

when the reservation was extinguished and reorganization of the tribe did not revive it.

IT IS SO ORDERED.

DONE BY THE COURT this 31st day of January, 1973.

WILLIAM N. GOODWIN
United States District Judge